86 - 1269

No. ___

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HENRY NEAL,
Administer of the Estate of
ROGER F. STROH

Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALLEN W. HOWELL
Attorney for Petitioner
Post Office Box 7367
Montgomery, Alabama 36107
(205) 262-6387
Counsel of Record

THOMAS L. DAVIS
Co-Counsel for Petitioner
Locke, Reynolds, Boyd & Weisell
Suite 2120
One Indiana Square
Indianapolis, Indiana 46204
(317) 639-5534

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

28pp

QUESTIONS PRESENTED

(1) Did the Court of Appeals for the Eleventh Circuit err in blindly adopting the reasoning of and following the holding of *White v. Excalibur Ins. Co.*, 599 F.2d 50 (C.A.5, 1979), *cert. denied* 444 U.S. 965 (1979), when the position taken in *White* is the opposite of a position in other Circuits with a contrary position having been taken by the Court of Appeals for the Fourth Circuit, in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974), and a District Court in the Seventh Circuit in *Riddle v. Trans-Cold Exp., Inc.*, 530 F.Supp. 186 (D.C., S.D. I11., 1982)? Further, in the Eleventh Circuit, a Florida appellate court has rejected the reasoning of the *White* decision in *Bryant v. Refrigerated Transport Co., Inc.*, 418 So.2d 281 (Fla.App., 1982). These cases involve the interpretation of that part of the Interstate Common Carrier Act, 49 U.S.C. §§10927(a)(1) and 11107(4) requiring motor carriers to assume full direction and control of leased vehicles, and the implementing regulations of the Interstate Commerce Commission found at 49 C.F.R. §1057.12(d)(1). Under existing case law, the remedy available to one injured by an interstate carrier depends on the *lex loci delicti* of that Federal Judicial Circuit.

(2) Did the Court of Appeals for the Eleventh Circuit err in blindly adopting the position of the Court of Appeals for the Fifth Circuit on an important federal question and thereby creating a lack of uniformity between state appellate courts in the Eleventh Circuit and the Court of Appeals for the Fourth Circuit and a District Court in the Seventh Circuit in the interpretation an application of 49 U.S.C. §§10927(a)(1) and 11107(4) and the implementing reg-

ulations of the Interstate Commerce Commission at 49 C.F.R. §1057.12(d)(1).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6
Appendix A—Memorandum Opinion and Judgment of the District Court	1a
AppendixB—Opinion and Judgment of the Court of Appeals	7a
Appendix C—Denial of Rehearing *en banc* by the Court of Appeals	10a
Appendix D—Order of District Court allowing amendment to complaint	12a
Appendix E—Amended Complaint	13a

TABLE OF AUTHORITIES

CASES:	Page
Bonner v. City of Pritchard 661 F.2d 1206 (C.A.11, 1981)	4
Bryant v. Refrigerated Transport Co., Inc. 418 So.2d 281 (Fla.App., 1982)	4,5
Proctor v. Colonial Refrigerated Transportation, Inc. 494 F.2d 89 (C.A.4, 1974)	3,4,5
Riddle v. Trans-Cold Exp., Inc. 530 F.Supp. 186 (D.C., S.D.I11., 1982)	4,5
White v. Excalibur Ins. Co. 599 F.2d 50 (C.A.5, 1979) *cert. denied* 444 U.S. 965 (1979)	4,5
STATUTES:	
49 U.S.C. §10927(a)(1)	2,3
49 U.S.C. §11107(4)	2,3
REGULATIONS:	
49 C.F.R. §1057.12(d)(1)	2,3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ___

HENRY NEAL,
Administrator of the Estate of
ROGER F. STROH

Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Henry Neal, Administrator of the Estate of Roger F. Stroh, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on August 22, 1986, and Issued as Mandate on November 18, 1986.

OPINIONS BELOW

The unreported Memorandum Opinion and Judgment of the United States District Court for the Mid-

dle District of Alabama are printed in Appendix A hereto, *infra,* page 1a. The unpublished *per curiam* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit are printed in Appendix B hereto, *infra,* page 7a. The unpublished notice of the denial of rehearing *en banc* by the United States Court of Appeals for the Eleventh Circuit is printed herein in Appendix C hereto, *infra,* page 10a.

JURISDICTION

The Judgment of the Court of Appeals (Appendix B, *infra,* page 8a) was entered on August 22, 1986. A timely petition for rehearing *en banc* was denied on November 4, 1986 (Appendix C, *infra,* page 10a) and the Judgment was issued as mandate on November 18, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. § 10927(a)(1) and 49 U.S.C. § 11107(4), and implementing regulations of the Interstate Commerce Commission at 49 C.F.R. § 1057.12(d)(1).

STATEMENT OF THE CASE

This is a wrongful death case arising out of a motor vehicle wreck that occurred on March 20, 1984 on U.S. Highway 82 in Bullock County, Alabama. Petitioner's intestate died as a result of that wreck. The action was filed in the Circuit Court of Jackson County, Indiana, removed to the United States District Court for the Southern District of Indiana by Respondent, and transferred to the United States District Court for the Middle District of Alabama on

motion of the Respondent. Petitioner's theory of liability against Respondent is that Tractor 6540, Inc. operated a tractor-trailer vehicle in interstate commerce pursuant to a contract with Respondent under Interstate Commerce Commission certificates and permits issued to Respondent, and that Petitioner's intestate died as the proximate result of the negligence of Tractor 6540's driver, Richard H. Blackburn, who was operating the vehicle at the time of the fatal wreck. Further, Petitioner contends that Respondent was negligent in assigning the Petitioner's intestate to the driver, Richard H. Blackburn, although Respondent was aware of and possessed information of numerous prior safety and log violations and even one prior chargeable accident, none of which was furnished to Petitioner's decedent. Petitioner's assertion of the liability of Respondent is grounded in the provisions of 49 U.S.C. §§ 10927(a)(1) and 11107(4) and 49 C.F.R. § 1057.12(d)(1) as interpreted by *inter alia*, the United States Court of Appeals for the Fourth Circuit in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should be Granted Because A Conflict Exists Between The United States Court of Appeals for the Fourth, Fifth And Eleventh Circuits On An Important Question of Federal Law Involving The Application and Interpretation Of 49 U.S.C. §§ 10927(a)(1) and 11107(4)

The United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits have differing interpretations of 49 U.S.C. §§ 10927(a)(1) and 11107(4) and implementing regulations of the Interstate Commerce Commission at 49 C.F.R. § 1057.12(d)(1), in situations

with facts similar to this case. The Fourth Circuit's well-reasoned opinion is in the case of *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974). In the Seventh Circuit, a United States District Court in Illinois has taken the same position as the Fourth Circuit in the case of *Riddle v. Trans-Cold Exp., Inc.*, 530 F.Supp. 186 (D.C., S.D.Ill., 1982). The United States Court of Appeals for the Fifth Circuit has taken a different position from the Fourth Circuit in the case of *White v. Excalibur Ins. Co.*, 599 F.2d 50 (C.A.5, 1979), *cert. denied* 444 U.S. 965 (1979). The United States Court of Appeals for the Eleventh Circuit in an unpublished opinion in the instant case *sub judice* did not independently consider the question, but blindly followed *White v. Excalibur Ins. Co., supra,* pursuant to its prior decision in *Bonner v. City of Pritchard,* 661 F.2d 1206 (C.A.11, 1981) by which all prior precedent of the "old" Fifth Circuit was adopted *in toto* as controlling precedent of the Eleventh Circuit. A state appellate court within the Eleventh Circuit has rejected the position of the Fifth Circuit (adopted by reference by the Eleventh Circuit) in the case of *Bryant v. Refrigerated Transport Co., Inc.*, 418 So.2d 281 (Fla.App., 1982).

Thus not only is there a conflict between circuits, but one state in the Eleventh Circuit has refused to accept the position adopted by the Eleventh Circuit in the instant case *sub judice.*

II. A Remedy Grounded In Federal Law Should Be Equally Available To All Without Regard To The Federal Judicial Circuit In Which The Remedy Is Sought.

Presently, the remedy that the Petitioner seeks is available in the Fourth and Seventh Circuits, but not

in the Fifth Circuit. See: *Proctor v. Colonial Refrigerated Transportation, Inc., supra,* (C.A.4), and *Riddle v. Trans-Cold Exp., Inc., supra,* and *White v. Excalibur Ins. Co., supra,* (C.A.5). Pursuant to *Bonner v. City of Pritchard, supra,* the Court of Appeals for the Eleventh Circuit blindly adopted the position of the Court of Appeals for the Fifth Circuit.

Within the Eleventh Circuit, the Court of Appeals in the State of Florida in a reasoned opinion has rejected the position blindly adopted by the Court of Appeals for the Eleventh Circuit in the instant case *sub judice.* See: *Bryant v. Refrigerated Transport Co., Inc., Supra.* Thus, within the Eleventh Circuit the availability or non-availability of the remedy sought by Petitioner is not uniform. In the State of Florida, a case which cannot be removed to a United States District Court (because of lack of total diversity or because of the amount in controversy) will be governed by a rule of decision allowing the remedy which Petitioner seeks, while a case that is removable will be governed by a rule of decision denying the remedy which Petitioner seeks.

Further, in the United States District Court in the State of Illinois, which is in the Seventh Circuit, the remedy sought by Petitioner is available (although the Seventh Circuit Court of Appeals has yet to speak to the issue). See: *Riddle v. Trans-Cold Exp., Inc., supra. The Petitioner had the remedy available to him in the Seventh Circuit where the case was originally filed. However, by forum shopping and having the case transferred the Respondent has denied the Petitioner his remedy.*

In sum, if the I.C.C. certificate and permit holder can, as in this case, maneuver the case from one

Judicial Circuit into another Judicial Circuit, the certificate and permit holder can deny a victim a remedy for the gravamen because the Federal law is not uniformly applied and the remedies it ostensibly provides are not equally available.

CONCLUSION

WHEREFORE, Your Humble Petitioner prays that this Honorable Court will, for the foregoing reasons, grant a Writ of Certiorari directed to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ALLEN W. HOWELL
Attorney for Petitioner
Post Office Box 7367
Montgomery, Alabama 36107
(205) 262-6387
Counsel of Record

THOMAS L. DAVIS
Co-Counsel for Petitioner
Locke, Reynolds, Boyd & Weisell
Suite 2120
One Indiana Square
Indianapolis, Indiana 46204
(317) 639-5534

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

APR 1 1986

MEMORANDUM OPINION

This wrongful death action is now before the court on the defendant Midwestern Distribution, Inc.'s February 28, 1986, motion for summary judgment. For reasons that follow, the motion is due to be granted and the case dismissed, albeit without prejudice.

I.

The undisputed facts of this case are as follows. The defendant Midwestern Distribution, Inc., a licensed interstate motor carrier, entered into a lease agreement with Tractor 6540, Inc. in November of 1983. Each company is incorporated in the State of Kansas. Under the terms of the lease, Tractor 6540 agreed to provide Midwestern

with trucks and drivers to be used in Midwestern's business.

Roger F. Stroh and Richard H. Blackburn were working for Tractor 6540 as drivers, hauling merchandise for Midwestern according to the terms of the lease. On March 20, 1984, while Blackburn was driving and Stroh was asleep in the truck's cab, their vehicle was involved in an accident on U. S. Highway 82 in Bullock County, Alabama. Stroh was killed in the collision.

Stroh was a resident of the State of Indiana. The administrator of Stroh's estate, Henry Neal, brought this tort action in the Jackson Circuit Court of Indiana on January 28, 1985. After being removed to the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C.A. §§ 1332 and 1441, the cause was transferred to this court pursuant to 28 U.S.C.A. § 1404(a). The amended complaint alleges two theories of recovery: First, that Midwestern is indirectly liable for Blackburn's negligence under the doctrine of respondeat superior; and second, that Midwestern is directly liable because it negligently selected Blackburn to be Stroh's co-driver. A jury trial is requested.

II.

The question presented by Midwestern's motion for summary judgment is whether Neal can maintain a common law action based on negligence. For reasons that follow, the court concludes that no such action can be maintained.

The basis for this conclusion begins with the surrounding regulatory framework. In 1956, Congress amended the interstate Common Carrier Act "to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles." *Price v. Westmoreland,* 727 F.2d 494, 496 (11th Cir. 1984). Motor carriers had previously immunized themselves from the negligence of drivers by designating them as independent contractors. *See*

generally Transamerica Freight Lines v. Brada Miller Freight Systems, Inc., 423 U.S. 28, 36-38, 96 S.Ct. 229, 233-234 (1975). Under the amended statute, motor carriers must now "assume complete responsibility for the operation of [leased] equipment for the duration of the lease." 49 C.F.R. § 1057.12(c)(1); *see also* 49 U.S.C.A. § 11107. They are treated as if they were the actual owners of the leased vehicles and must "assume the burden of liability for the harm caused by their leased vehicles . . . ." *White v. Excalibur Insurance Co.*, 599 F.2d 50, 53 (5th Cir.), *cert. denied*, 444 U.S. 965, 100 S.Ct. 452 (1979).

Because each carrier "now has both a legal right and duty to control vehicles operated for its benefit," drivers are considered each carrier's "statutory employees." *Id.* When members of the public are injured by such drivers, federal law creates a tort remedy against the carrier for negligence. *See, e.g., Price v. Westmoreland*, 727 F.2d at 496; *Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1973).

However, unlike members of the public, drivers may not recover for on the job injuries by bringing a common law suit for negligence against carriers. Their only remedy against carriers, who are, in effect, their "statutory employers," lies in state worker compensation laws. *White v. Excalibur Insurance*, 599 F.2d at 53-54. This approach is based on considerations of fairness. Motor carriers are subjected to liability under federal tort law because harm to the public is deemed to have been caused by their "statutory employees." It would be unfair to allow those same "employees" to sue the carriers in tort when other employees are barred from bringing such lawsuits under state worker compensation laws. To do so "would broaden [the] exposure [of statutory employers] to suit beyond that to which employers in fact are subject." *Id.* at 53. Thus, when the driver of a leased vehicle causes injury or death to a fellow driver while hauling goods for a carrier, the carrier's total liability is determined not by reference to com-

mon law principles of negligence, but by state worker compensation.[1]

Here, Midwestern leased trucks and drivers from Tractor 6540 and agreed to assume full responsibility for and control over the trucks and drivers for the duration of the lease. Midwestern, as a carrier, must therefore be treated as if it actually owned the trucks. Moreover, Stroh and Blackburn, as drivers of those trucks, must be deemed statutory employees of Midwestern. Where, as here, Stroh was killed during the course of his duties on behalf of Midwestern, his exclusive remedy against Midwestern is confined to whatever relief is provided by applicable state worker compensation law. *White v. Excalibur Insurance, supra.* Midwestern's motion for summary judgment is therefore due to be granted. *Id.*

III.

The court is of the opinion, however, that the dismissal should be without prejudice. It may be that Stroh has an action against Midwestern under Alabama or Kansas worker compensation law, although the court need not decide that question.

An appropriate judgment will be entered.

DONE, this the 1st day of April, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

---

[1] The plaintiff suggests that this court should not follow *White.* He contends that *White* represents a minority view on the issues presented. Even if this assertion were true, however, *White*, is a decision of the former Fifth Circuit Court of Appeals, and as such, is binding on this court. *See Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir. 1981) (en banc). Moreover, *White* was cited with approval in *Price v. Westmoreland,* 727 F.2d at 496, a recent Eleventh Circuit decision.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-5-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

APR 1 1986

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That defendant Midwestern Distribution, Inc.'s February 28, 1986, motion for summary judgment be and it is hereby granted;

(2) That this cause be and it is hereby dismissed without prejudice; and

(3) That costs be and they are hereby taxed against plaintiff Henry Neal, administrator of the estate of Roger F. Stroh, for which execution may issue.

DONE, this the 1st day of April, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7283
Non-Argument Calendar

HENRY NEAL, Administrator of
the Estate of Roger F. Stroh,
Plaintiff-Appellant,

versus

MIDWESTERN DISTRIBUTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

(August 22, 1986)

Before RONEY, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

The district court properly applied the precedent established by *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979). That case is binding on panels of the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981) (en banc). Although appellant urges this Court to reconsider its holding in *White*, only the en banc court can overrule a panel decision binding on this Court. *Id.* at 1209.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7283
Non-Argument Calendar

D.C. Docket No. 86-0015

HENRY NEAL, Administrator of
the Estate of ROGER F. STROH,
Plaintiff-Appellant,

versus

MIDWESTERN DISTRIBUTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

Before RONEY, HILL and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 22, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: NOV 18, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

November 4, 1986

(Rev. 10/84)

TO ALL PARTIES LISTED BELOW:
NO. 86-7283 NEAL v. MIDWESTERN DISTRIBUTION, INC.

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

___ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ, CLERK

By:/s/ SANDIA L. SEABURY
Deputy Clerk

cc: Allen W. Howell, Esquire
Thomas L. Davis, Esquire
James H. Anderson, Esquire

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

MAR 11 1986

ORDER

Based upon the representations made at the pretrial conference on March 10, 1986, it is ORDERED that the plaintiff's March 7, 1986, motion for leave to amend complaint is granted.

DONE, this the 11th day of March, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of the Estate of ROGER F. STROH,

Plaintiff,

-v-

MIDWESTERN DISTRIBUTION, INC.,

Defendant.

AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH

Count I.

1. On or about October 11, 1984, Carol Speckner, Clerk of the Circuit Court of Jackson County, issued Letters of Administration to plaintiff as administrator of the Estate of Roger F. Stroh for the purposes of pursuing a wrongful death action. A copy of said Letters of Administration is attached hereto as Exhibit "A".

2. At all times relevant herein, Roger F. Stroh was a resident of Jackson County, Indiana.

3. At all times relevant herein, defendant Midwestern Distribution, Inc. did business in the State of Indiana.

4. Roger F. Stroh died as a result of a motor vehicle accident in the State of Alabama on March 20, 1984.

5. Roger F. Stroh was survived by his dependents, Jean Stroh, wife, and Anthony D. and Lori L., children.

6. At the time of his death, Roger F. Stroh was employed by Tractor 6540, Inc.

7. At all times relevant herein, Tractor 6540, Inc. operated a tractor pursuant to a contract with Midwestern Distribution, Inc. and under Interstate Commerce Commission certificates and permits issued to Midwestern Distribution, Inc. A copy of the aforesaid contract is attached hereto as Exhibit "B".

8. The death of Roger F. Stroh was proximately caused by the negligence of Richard H. Blackburn who was operating a tractor-trailer pursuant to Interstate Commerce Commission certificates and permits issued to Midwestern Distribution, Inc.

9. As a result of the aforesaid vehicle operated by Richard H. Blackburn imposed upon Midwestern Distribution, Inc., by law, it is liable for the death of Roger F. Stroh.

WHEREFORE, plaintiff Henry Neal, Administrator of the Estate of Roger F. Stroh prays for a judgment against defendant Midwestern Distribution, Inc. for all damages recoverable under law proximately caused by the wrongful death of Roger F. Stroh.

Count II.

1. Plaintiff incorporates by reference rhetorical paragraphs 1, 2, 3, 4, 5 and 8 of Count I.

2. On or about February 24, 1984, Roger F. Stroh, having completed a driver instruction course offered by defendant Midwestern Distribution, Inc., was assigned by defendant to Tractor 6540, Inc. as a co-driver to Richard Blackburn, president of Tractor 6540, Inc., an independent contractor of Midwestern Distribution, Inc.

3. Prior to said assignment, Midwestern Distribution, Inc. was aware and had considerable information that Richard Blackburn had committed numerous log violations

in violation of the safety policy of defendant and had been involved in at least one chargeable accident.

4. Midwestern Distribution, Inc. breached its duty and did not communicate any of the aforesaid information to Roger F. Stroh prior to assigning him to Tractor 6540, Inc. as a co-driver.

5. The death of Roger F. Stroh was proximately caused by the negligence of Midwestern Distribution, Inc.

WHEREFORE, plaintiff Henry Neal, Administrator of the Estate of Roger F. Stroh prays for judgment against defendant Midwestern Distribution, Inc. for all damages recoverable under law proximately caused by the wrongful death of Roger F. Stroh.

LOCKE REYNOLDS BOYD & WEISELL

By:/s/ THOMAS L. DAVIS
THOMAS L. DAVIS
Attorneys for Plaintiff
Henry Neal, Administrator of the
Estate of Roger F. Stroh